Supreme Court, U. S.
FILED
OCT 8 1975
MICHAEL RODAK, JR., CLERK

No. 75-261

In the Supreme Court of the United States

OCTOBER TERM, 1975

BACHRODT CHEVROLET CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-261

BACHRODT CHEVROLET CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals enforcing the Board's supplemental order (Pet. App. 1a-8a) is unreported. Its initial opinion (Pet. App. 21a-40a) is reported at 468 F. 2d 963, and the order of this Court remanding the case (Pet. App. 19a) is reported at 411 U.S. 912. The Board's initial decision and order (Pet. App. 41a-78a) are reported at

186 NLRB 1035, and its supplemental decision and order (Pet. App. 9a-16a) are reported at 205 NLRB 784.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1975. The petition for a writ of certiorari was filed on Monday, August 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the successor employer hired a majority of the predecessor's employees and then, after its bargaining obligation to the union had matured, unilaterally changed the employees' working conditions.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 79a-80a.

STATEMENT

In November 1969, petitioner ("Bachrodt") purchased from Zimmerman its automobile dealership (Pet. App. 49a-50a). All of Zimmerman's service department employees had been represented by Lodge 1096, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union"), with

which Zimmerman had a collective bargaining agreement (Pet. App. 47a-49a).

Zimmerman's last day of operation was Saturday, November 8 (Pet. App. 52a; O.A. 83).[1] On Thursday, November 6, Zimmerman informed its employees that a change in ownership would take place over the weekend (Pet. App. 52a; O.A. 155). The next day, representatives of Bachrodt distributed job application forms to Zimmerman's employees (Pet. App. 52a; O.A. 155). Every employee in the existing bargaining unit, with the exception of one or two who did not fill out applications, was then interviewed and hired by Bachrodt (Pet. App. 53a, n. 9; O.A. 143-144). Each reported for work when Bachrodt began operations on the following Monday, November 10 (Pet. App. 53a).

On November 7, the Union, on learning of the impending change, notified Bachrodt that the existing agreement between Zimmerman and the Union was effective until February 8, 1970, and therefore would bind Bachrodt (Pet. App. 53a-54a). In a reply dated November 10, Bachrodt stated that it would not be bound by the collective bargaining agreement and would not negotiate with the Union (Pet. App. 55a-56a). On November 12, the Union requested a meeting with Bachrodt to discuss the "existing labor agreement" and also "to negotiate any and all matters pertaining to * * * conditions of employment"

[1] "O.A." references are to the appendix to the briefs in the original proceeding before the court of appeals (No. 71-1354). A copy has been lodged with the Court.

of its members (Pet. App. 56a-57a). Bachrodt refused to meet with the Union (Pet. App. 57a-58a).

Meanwhile, on November 10, the day it commenced operations, Bachrodt announced and thereafter implemented certain changes in the working conditions that had existed under Zimmerman (Pet. App. 59a).[2] Bachrodt did not notify the Union or consult with it concerning any of the changes (Pet. App. 69a).

In its initial decision the Board found that Bachrodt was a successor to Zimmerman because it continued the business with substantially the same work force. It held that Bachrodt violated Section 8(a)(5) and (1) of the Act by refusing, on and after November 10, 1969, to bargain with the Union as the representative of its employees and by unilaterally changing the employees' work conditions (Pet. App. 42a-43a, 68a-69a); and that Bachrodt further violated its bargaining obligation by refusing to honor the contract between Zimmerman and the Union (Pet. App. 43a, 69a-70a). The Board ordered Bachrodt to bargain with the Union; to honor and abide by the terms of the existing contract; to cancel, upon request, the unilateral changes in working conditions; and to make restitution for any benefits lost because of those unilateral changes (Pet. App. 74a-76a).

[2] It adopted a new method of computing the wages of service mechanics, increased from two to eight the number of paid hours employees would take off on Good Friday, changed the method of computing hourly pay for holiday time off, eliminated paid vacations, made Saturday morning work mandatory, and ceased to operate the body shop (Pet. App. 59a-61a).

The court of appeals (with one judge dissenting) enforced the Board's order, finding that Bachrodt committed an unfair labor practice by unilaterally changing working conditions after commencing operations (Pet. App. 31a-32a). The court noted that the changes were not "part of the initial terms of rehiring" (Pet. App. 31a), since Bachrodt "gave assurances to each employee that he would be rehired" (*ibid.*), and the employees were not told of the proposed changes in working conditions on Friday, nor were they instructed to report for work only if prepared to accept any such changes (Pet. App. 32a). Alternatively, the court found that Bachrodt planned to retain all the employees in the unit, and had failed to consult with them before fixing terms (*ibid.*).[3]

On Bachrodt's petition for a writ of certiorari, this Court vacated the judgment of the court of appeals and ordered the case remanded to the Board "for such further proceedings as may be appropriate, in light of *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 * * *" (411 U.S. 912).

On remand, the Board reexamined the evidence in light of *Burns*, and concluded that (Pet. App. 14a):

[3] The court of appeals declined, however, to enforce that part of the Board's order requiring Bachrodt to honor and abide by the Zimmerman contract, because of this Court's intervening decision in *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, in which it was held that a successor employer is not required to honor the predecessor's collective bargaining agreement (Pet. App. 29a-30a).

> when [Bachrodt] took over the business on November 10, it had completed hiring its work force, which consisted of 22 employees, all of whom had formerly worked for Zimmerman. Under the teaching of *Burns*, [Bachrodt] had a bargaining obligation as a successor to Zimmerman. Its position on that date was akin to that of an employer confronted with a newly selected bargaining representative. It was not free thereafter to establish or change conditions of employment for unit employees without bargaining with the Union [footnote omitted].[4]

The Board reaffirmed the portion of its order requiring Bachrodt to bargain with the Union and to make restitution for any benefits which may have been lost by virtue of the unilateral changes in terms and conditions of employment (Pet. App. 14a).

The court of appeals upheld the Board's evidentiary findings and enforced its order (Pet. App. 1a-8a).

---

[4] Alternatively, the Board concluded that (*ibid.*):

> it is apparent that as of November 7 [Bachrodt] planned to "retain all of the employees in the unit" and at such time "it was appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Indeed, the Union made its first bargaining demand on November 7. Thus, it is clear that [Bachrodt] planned to, and did, retain virtually all of its predecessor's employees in the unit, and that these employees were represented by the Union and constituted a majority of the unit both before and after the transfer of ownership.

ARGUMENT

In *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, this Court held that a successor employer is not required to adhere to its predecessor's collective bargaining agreement and, in most instances, unilaterally may set initial terms of employment. The court further held, however, that a successor employer has "a duty to bargain" when, and after, it has "selected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past" (406 U.S. at 278), *or*, prior thereto, if it was "perfectly clear [that the successor employer] plans to retain all of the employees in the unit" (*id.* at 294-295).

As the court of appeals found, there was substantial evidence here to support the Board's finding that Bachrodt changed employment conditions *after* it had hired all but two of its predecessor's unit employees and therefore was under an obligation to bargain with the Union. The correctness of this finding raises only an evidentiary issue that does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

Contrary to petitioner's contention (Pet. 8-9, 12 and nn. 6, 7), *Burns* did not establish a new evidentiary standard, requiring that all the Board's findings with regard to a successor employer be supported by "perfectly clear" evidence. That language refers only to the exceptional situation where a successor employer's bargaining obligation attaches before he has ac-

tually hired a majority of the predecessor's work force. Since there was substantial evidence that Bachrodt changed employment conditions after it hired its predecessor's employees, it is unnecessary to examine whether there was a sufficient basis for the Board's alternative finding that Bachrodt had planned prior to the takeover to retain all the unit employees.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

OCTOBER 1975.

---

[5] *National Labor Relations Board* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (C.A. 6), and *Spruce Up Corporation*, 209 NLRB 194, upon which petitioner relies (Pet. 14-15, 18-19 and n. 8), deal with the "perfectly clear" standard and therefore are not in conflict with the holding in the instant case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 594094 66